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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE R. ARIYOSHI, GOVERNOR, STATE OF HAWAII, *et al.*,
Petitioners,

v.

SELWYN A. ROBINSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF OF McBRYDE SUGAR COMPANY, LIMITED, IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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* The listing of parent companies, subsidiaries and affiliates required of respondent McBryde Sugar Company, Limited, by Rule 28.1 of the Rules of the Supreme Court was annexed to the Appearance Form previously filed in this case on behalf of McBryde Sugar Company, Limited.

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Respondent McBryde Sugar Company, Limited ("McByrde"), submits this supplemental brief pursuant to Rule 22.6 in order to address new matter raised in the Brief for the United States as Amicus Curiae.

The gist of the Solicitor General's argument is that this case, though ripe from January 1973 through December 1982, became unripe by reason of the Hawaii Supreme Court's answers to certified questions (the "An-

swers").[1] In particular, through a selective reading of the Answers, the Solicitor General argues that the decision of the Hawaii Supreme Court in *McBryde*[2] now lacks sufficient finality and may not sufficiently affect respondents' existing water uses to merit the exercise of jurisdiction by the federal courts.

1. The Solicitor General wrongly believes that there are ongoing proceedings or other adequate remedies available to respondents in state court.

In proceeding without the benefit of the full record in this case, the Solicitor General erroneously makes the crucial assumption that there are "ongoing proceedings in state court" (United States Brief at 11) in which the offensive rulings in *McBryde* can be refined and further ripened or obviated. *See also id.* at 15 and 17, referring to "questions that apparently remain open in further proceedings in *McBryde* itself," and at 18, referring to "any necessary state court proceedings . . . run[ning] their course." The courts below were well aware not only that there are no pending proceedings in state court in *McBryde*[3] but also that the *McBryde* court already "refused" to hear or consider respondents' claims. App. 5a, 8a, 9a, 63a, 78a, 79a, 96a, 104a n.35. Respondents already tried without success to have an evidentiary hearing in state court on the substantive issues that the Solicitor General thinks can still be addressed in "ongoing proceedings in state court." Exs. PSC-59 (App. 353a), PSC-62, PSC-65 (App. 358a) (petitions for re-

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[1] *Robinson v. Ariyoshi*, 64 Haw. 641, 658 P.2d 287 (1982).

[2] *McBryde Sugar Co. v. Johnson*, 54 Haw. 174, 504 P.2d 1330, *rehearing denied*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed for want of jurisdiction, cert. denied*, 417 U.S. 962, 976 (1974).

[3] The nonexistence of ongoing proceedings in state court renders irrelevant the Solicitor General's characterization of the *McBryde* rulings as merely "law of the case." United States Brief at 8 and 15.

hearing and for opportunity to present evidence, all denied by the Hawaii Supreme Court, Exhs. PSC-60, & PSC-77, App. 112a).

Whatever may be the contentions of the Solicitor General or the Hawaii Supreme Court in the Answers, the state officials are the litigants in this case; and they unequivocally took the position before the Court of Appeals that the *McBryde* decision is final and that this case is in no respect "premature." *See* State Officers Memorandum on the Documents Which Constitute the Judgment for Res Judicata Purposes under the Law of Hawaii, attached as App. D to Robinson Brief in Opposition. Even after issuance of the Answers, these officials contended to the Court of Appeals that the *McBryde* decision was a final determination that "all surplus water . . . was the property of the State of Hawaii and impressed with a public trust." Memorandum by Appellants on the Effect of Hawaii Supreme Court's Opinion of December, 1982, on the Instant Case and the Answers to the Certified Questions, at 3 (Oct. 3, 1983). They emphasized that "[t]here can be no confusion or misunderstanding on said issues by Appellees." *Id.*

Through a selective reading of the Answers, the Solicitor General suggests that respondents may also be able to protect their property interests through new litigation in state court. United States Brief at 18. On this issue the Solicitor General has not considered the Answers as a whole and has neglected to point out to the Court the portion of the Answers stating that the state "circuit courts would be without jurisdiction to entertain" any suit challenging any ruling in *McBryde* as a taking. App. 36a-38a. The Answers assert that the state courts in any future state court proceedings must follow *McBryde*—even the dicta in *McBryde*—without questioning its constitutionality. *Id.*, App. 27a-28a ("The rulings in *McBryde* with respect to water ownership and water diversion have binding effect in the state courts of Hawaii.").

Even if taken at face value, the hope of future state court relief is too limited to make the present case unripe. Despite Hawaii statutory provisions (sections 664-31 to -36, Hawaii Rev. Stat.) for the adjudication of water rights, the Answers now say that the parties cannot bring suit in state court to quiet title to their water rights. App. 21a-22a. Nor can the private parties sue in state court for damages for the taking of their water rights in *McBryde*. App. 31a n.13. Nor can the private parties bring suit in state court for any relief contrary to the legal rulings articulated in *McBryde*. App. 36a-41a. The most that respondents can do is to wait for the opportunity to file an action "to enjoin the cessation of particular diversions." App. 42a. In other words, if in the future petitioners take action to interrupt one of respondents' "particular diversions," then respondents can sue to enjoin that cessation, encumbered, of course, by all the precedential rulings in *McBryde* stripping respondents of their title to water rights and limiting their rights to divert. App. 28a. In the meantime respondents have no right to state court relief to vindicate their titles nor to have declaratory or other relief confirming or protecting the many incidents of ownership of water rights. Nor is there any indication that any defenses which might be available to respondents would run with title to respondents' land or otherwise be available to respondents' successors, thus rendering respondents' water rights unsalable and discouraging any investment in reliance on the rights.

2. The Solicitor General would have the federal court abdicate decision of the federal questions in this case to the state court.

Even if the Answers were completely straightforward and responsive to the certified questions, the Solicitor General would have this Court give far greater weight to the Answers than is proper. The scope of answers to certified questions is limited to a resolution of unsettled

state law issues and cannot change the facts found by the federal trial court. Federal issues must be decided by the federal court because "[a] federal court may not impose on a state court the responsibility for determining a federal question." *Imel v. United States*, 523 F.2d 853, 857 (10th Cir. 1975). *See Zant v. Stephens*, 462 U.S. 862, 873 (1983). The federal questions in the present case include, at a minimum, (1) relief for the denial of procedural due process by the *McBryde* court in failing and refusing to afford respondents any semblance of notice or a fair hearing for the protection of their property rights, (2) relief for the taking of valuable water rights and incidents of ownership with neither predeprivation nor postdeprivation compensation and (3) protection of the integrity of the 1931 decree of the Court of Appeals in *Territory v. Gay*, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931), *affirming* 31 Haw. 376 (1930).[4]

The Solicitor General's suggestion (United States Brief at 11) that principles of comity would warrant abstention in this case is completely ill-founded, again largely because of the erroneous presumption by the Solicitor General that there are "ongoing proceedings in state court." A balanced reading of the Answers eliminates any notion that this federal case might be susceptible to disposition by abstention.

To the extent that principles of comity apply, the Solicitor General has confused this case by treating it as a federal intrusion into a subject of state law. So far as intrusion is concerned, this case more aptly addresses the

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[4] In *Territory v. Gay* the Court of Appeals affirmed the award of surplus water in Hanapepe to predecessors of the Robinson respondents. "By surplus water is meant the usual flow of the stream over and above prescriptive and appurtenant rights to the flow . . . ." 52 F.2d at 358. Thus, the 1931 decree of the Ninth Circuit Court of Appeals left no room for erosion of private ownership of surplus water by sua sponte enunciation of doctrines of public ownership and reparianism in *McBryde*.

opposite sort of intrusion; namely, the uninvited intrusion by the *McBryde* court into the private ownership and diversion of surplus water decreed by the federal court in *Territory v. Gay*, 52 F.2d 356 (9th Cir. 1931). It is remarkable that the Solicitor General would quarrel with the Court of Appeals' interpretation of the operation and effect of its own earlier decree. App. 11a.

3. The Solicitor General ignores the important distinction between ripeness resulting from the taking of title to water rights and ripeness resulting from regulatory interference with water uses.

In order to try to bring this case within the aura of the ripeness principles articulated in *Williamson County Regional Planning Commission v. Hamilton Bank*, No. 84-4 (June 27, 1985), the Solicitor General strains to recast this case as regulatory [5] in nature and focuses solely on whether *McBryde* definitively and concertedly interferes with respondents' "uses" of water, as distinguished from all the other incidents of ownership in the water rights at issue here.

The Solicitor General contends that there has not yet been a disruption of existing water uses sufficient to make the taking claim in this case ripe for relief. However, the Solicitor General does concede that *McBryde* and the Answers "establish . . . that the Robinson respondents do not own the surplus water in the sense of having the unfettered right to use it in any manner

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[5] The Solicitor General has the novel notion that the State of Hawaii "has assigned to its courts the responsibility for defining and *regulating*" water rights. United States Brief at 11 (emphasis added). The basis for this notion is a citation to sections 234-30 to -36, Revised Laws of Hawaii (1955), now superseded by sections 664-31 to -36, Hawaii Rev. Stat. By no stretch of the imagination does the cited statute give regulatory responsibility to the state courts. Rather, the statute only gives the courts jurisdiction to adjudicate specific controversies between claimants and only when a party invokes that jurisdiction. The court then exercises only judicial power under Article V of the Constitution of the State of Hawaii.

they choose, and none of the respondents has 'absolute and exclusive' interests in the water, including an 'inherent enforceable right' to transmit water beyond the land to which their usufructary interests appertain." United States Brief at 17. But respondents have vigorously contended and the District Court found (and the Court of Appeals affirmed) that respondents do have such ownership of the surplus water and do have absolute and exclusive interests in the water and an inherent enforceable right to divert the water out of the watershed. App. 10a-11a, 101a-102a. Thus, on the basis of the concrete conflict conceded by the Solicitor General to exist between the rulings in *McBryde* and the Answers, on the one hand, and the adjudicated rights of respondents, on the other, this case is fully ripe.

In regulatory taking cases such as *Williamson*, there is no dispute about the private ownership of the property being regulated, and the question is whether the regulation so severely impinges upon the property as to constitute a taking. However, the dispute in this case goes to the heart of respondents' ownership of their water rights. It will not suffice to say that this case is premature just because there may not yet be actual interference with existing uses. The degree of interference with existing uses is not the issue in this case. Rather, the case revolves around whether respondents still have water rights that can be sold, leased, relied upon and devoted to new or different uses. Insofar as the purpose of this case is to protect those property rights, not from regulation but from outright confiscation, the case is more nearly akin to cases such as *Summa Corp. v. California*, 466 U.S. 198 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Hughes v. Washington*, 389 U.S. 290 (1967); and *Damon v. Hawaii*, 194 U.S. 154 (1904), than it is to regulatory taking cases such as *Williamson*.

In the kind of cases involving state action that clouds the title to property, the Court has readily found ripe-

ness if state action has clouded title or posed an imminent threat to do so. *Risty v. Chicago, R.I. & P. Ky.*, 270 U.S. 378, 388 (1926).[6]

4. The Solicitor General ignores the significant distinction between ripeness in a Just Compensation Clause case and ripeness in a Due Process Clause case.

By focusing on the ripeness of *McBryde* under the holding in *Williamson*, a Just Compensation Clause case, the Solicitor General overlooks the Due Process Clause deficiencies in *McBryde* and this Court's different ripeness standard under the Due Process Clause. *McBryde* is different from *Williamson* because *McBryde* is both a Just Compensation Clause case and a Due Process Clause case. Although the jury in *Williamson* specifically found no violation of procedural due process, 87 L. Ed. 2d at 136 n.4, the District Court, App. 96a, and Court of Appeals in this case both clearly found that the *McBryde* judgment was entered without any semblance of due process. App. 4a, 7a.

This Court pointed out in footnote 14 of *Williamson* the important difference between cases decided solely under the "special nature of the Just Compensation Clause" and cases decided under the Due Process Clause. There is a clear distinction between Just Compensation Clause cases such as *Parratt v. Taylor*, 451 U.S. 527 (1981), where there is no procedural due process issue because predeprivation process is impossible or impracticable, and Due Process Clause cases such as *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), where the state could and should have provided predeprivation due process but did not. Under the standard of the procedural Due Proc-

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[6] For purposes of ripeness the Court has also distinguished administrative determinations from judicial decrees and has found determinations arising from court judgments to be ripe even though similar determinations arising from administrative decisions were not ripe. *Arizona v. California*, 460 U.S. 605, 634-37 (1983).

ess Clause cases, *McBryde*, a case where even a post-deprivation hearing was denied, must be ripe.

5. The Solicitor General overlooks the need to address the conceded ripeness of this case during the 10 years between *McBryde* and the Answers.

The Solicitor General does not question the ripeness of this case from January 1973, when the *McBryde* decision was issued, to December 1982, when the Answers were handed down. United States Brief at 12-13. In the interim, respondents suffered the consequences of the taking wrought by *McBryde*, the parties tried the case and obtained judgment in the District Court, and the state officials persisted on appeal to try to support the taking. Even if there were merit in the Solicitor General's notion that a case ripe for ten years could thereafter cease to be ripe, there is no basis to conclude that the District Court ever lacked jurisdiction or that its judgment was wrong in any respect.

The taking as it appeared on the record from 1973 through 1982 was more than a minor temporary taking. There is certainly no justification for any summary dismissal of the case from federal court. There is nothing new for the Court of Appeals to consider on a remand. Nor is there a sufficient likelihood of recurrence of cases like this[7] to warrant discretionary review by this Court.

CONCLUSION

It is apparent that the Solicitor General is mistaken in believing that there may be state remedies available to respondents, and his analysis is incomplete in over-

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[7] According to the Shepard's system, the District Court's opinion, issued in 1977, has to date been cited only three times in reported federal court decisions. The Court of Appeals' opinion has been cited only twice.

emphasizing *Williamson* ripeness principles in a case which is far more complex and multi-faceted than *Williamson*. The Court of Appeals has already amply considered the controlling merits of this case, the bulk of which the Solicitor General has ignored. Further review of those merits will not change the result. For the reasons previously urged by respondents, the petition for writ of certiorari should be denied.

Respectfully submitted,

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